

Some remarks on the implementation of the Vienna Convention

by

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The 1963 Vienna Convention on Civil Liability for Nuclear Damages, which was adopted more than 50 years ago, was the first international instrument having worldwide aspirations on third party liability for nuclear damages. Today that convention has 39 contracting parties, among them 10 EU member states, and 13 signatories.¹ However, its solutions reflect the situation of half a century ago. In the last 50 years not only has the nuclear industry developed considerably, but, unfortunately, our knowledge on the dimension and the effects of a catastrophic nuclear accident has also increased. At the end of the 1980s that prompted the international community of states to revise the 1963 Vienna Convention, and the outcome was the 1997 Protocol to Amend the Vienna Convention on Civil Liability for Nuclear Damage. That treaty entered into force on 4 October 2003 and since that time there are in effect two Vienna Conventions on civil liability for nuclear damages, the original version of the 1963 Vienna Convention and its amended version, the 1997 Protocol. The later has 11 state parties, among them 3 EU member states (Latvia, Poland and Romania), and 15 signatories, 3 EU states (the Czech Republic, Hungary and Lithuania) having signed the instrument.

In international practice is quite normal that after some years of existence a treaty is amended and, if the earlier treaty is not terminated or suspended in operation, for a certain period the original instrument and its revised version are in a sense living together, although the aim is to promote the acceptance of the new instrument and achieve a situation whereby the old instrument is being replaced by the amended version of the treaty.

In the case of nuclear liability conventions, taking into consideration the subject of these instruments, the coexistence of two conventions is not a favourable situation. Not only because the 1997 Protocol—reflecting the changes since 1963 and improving the situation of

¹ See <http://www.iaea.org/Publications/Conventions>

potential victims—has less than one third of the contracting parties than the 1963 Vienna Convention, but because that situation might cause considerable problems in practice and in the case of a nuclear incident that could delay the prompt and fair compensation of potential victims.

The problems connected with the possible coexistence of the two instruments were treated during the negotiations on the revision of the 1963 Vienna Convention and the solution can be found in Art. 19 of the 1997 Protocol. It should be added that this provision is fully in line with Art. 40 of the 1969 Vienna Convention on the law of treaties, providing for situations when, as a result of the amendment of a treaty, two categories of parties to the treaty come into being; namely those states which are parties only to the unamended treaty, and those who are parties to both instruments.²

The elaboration of Art. 19 of the Protocol Amending the Vienna Convention was made on the assumption that in a relatively short transitory period the provisions of the 1997 Protocol would replace the 1963 Convention. However, instead of that, nowadays, even after more than 17 years of the adoption of the Protocol there are two Vienna Conventions in force, creating a rather complex situation. As was previously mentioned, the relations of the contracting parties of the two instruments are regulated in Art. 19 of the Protocol, which provides that

“1. A State which is a Party to this Protocol but not a Party to the 1963 Vienna Convention shall be bound by the provisions of that Convention as amended by this Protocol in relation to other States Parties hereto, and failing an expression of a different intention by that State at the time of deposit of an instrument referred to in Article 20 shall be bound by the provisions of the 1963 Vienna Convention in relation to States which are only Parties thereto.

2. Nothing in this Protocol shall affect the obligations of a State which is a Party both to the 1963 Vienna Convention and to this Protocol with respect to a State which is a Party to the 1963 Vienna Convention but not a Party to this Protocol.”

² It should be mentioned that in Art. 19, para. 1 of the 1997 Protocol there is envisaged a third situation where there are states which are only contracting parties to that instrument and didn't accede to the 1963 Vienna Convention.

One could imagine how complicated it would be to settle the claims of compensation if there is a nuclear accident in a new Vienna state, and there are victims both in the old and new Vienna states and even in the Paris states which have the right to compensation due to the 1988 Joint Protocol Relating to the Application of the Vienna Convention and the Paris Convention establishing a bridge between the two liability regimes. Taking into consideration the differences in amounts, heads of damages, geographical scope, etc. of the two Vienna Conventions, one wonders how it should be handled in these cases. Not to mention the problems that might emerge due to differences in the time of prescription. If there are hundreds or thousands of victims suffering damage to property in old and new Vienna states, what percentage of the money available for compensation should be secured for the victims of the new Vienna states for health impairments which may appear years after the incident, but still within the 30 years of time of prescription.

Almost 25 years after the start of the revision exercise of the 1963 Vienna Convention one could say that any conceivable transitory period has elapsed and one should now think how to strengthen the 1997 Protocol Amending the Vienna Convention and achieve its wider acceptance.

One of the possibilities might be to encourage states to join the Protocol and call for ratification and accession of those states which have already signed the instrument. In that respect a very careful comparative analysis of the national legislation of EU states might be helpful, in that regard I'm referring not only to the problems of amounts. Thus it would be advisable to analyse each states' national laws separately and point out the differences between the treaty provisions and the national laws.

Although the contracting parties to the Protocol amending the Vienna Convention is approximately one third of the 1963 Vienna Convention, since the adoption of the Protocol several states had amended its nuclear liability legislation or adopted laws reflecting the basic principles of nuclear third party liability conventions. Thus the Protocol had some effects of harmonisation even on the national legislation of some states which have not yet adhered to that instrument.

Let me refer also to a practice which has contradicted the aims of achieving a wider acceptance of the 1997 Protocol Amending the Vienna Convention namely that there have been states which acceded to the original version of the Vienna Convention even after the entry into force of the new instrument. That practice not only does not support the wider acceptance and application of the 1997 Protocol Amending the Vienna Convention but it strengthens a convention with such provisions which, already 25 years ago, was regarded by the international community of states as not fulfilling the requirements of a modern convention on nuclear third party liability.

In connection with the Vienna Convention one should say a few words on the claims handling procedures under the Protocol Amending the Vienna Convention.

During the negotiations on the elaboration of the 1997 Protocol the delegates referred to several problems that might emerge in connection with the claims handling procedures, however, the majority view was that these questions should be left to the state having jurisdiction or the competent courts.

One could question whether this was the best solution and it wouldn't be possible, while maintaining the provisions of Art. XI. of the Vienna Convention as amended by the Protocol, to consider whether alternative dispute settlement mechanisms wouldn't be more adequate to settle nuclear claims for compensation, and here I have in mind arbitration and mediation. This might be advisable especially because Art. XI on jurisdiction is extremely complicated, on the one hand, and for the EU states EU law should also be taken into consideration, as well. That problem is not a question of nuclear law, but much more one of civil procedural law. It is well known that the European Commission Nuclear Liability Expert Group has elaborated on some suggestions of the matter, but I think it might be possible to go further in that respect.

Nowadays the alternative third party dispute settlement mechanisms are having a renaissance. Taking into consideration the complexity of a nuclear incident, the alternative dispute settlement mechanisms with their flexibilities, together with the composition of panels of arbitrators or mediators, might shorten the claims procedure and diminish the expenses of the

administration of claims. It should be added that these mechanisms might be advantageous to foreign victims as well and even victims of states not being parties to any nuclear liability conventions.